



P.O. Box 216 Klamath Falls, Oregon 97601

May 17, 2010

The Council on Environmental Quality
Attn: Ted Boling
722 Jackson Place, NW
Washington, D.C. 20503

Re: New CEQ National Environmental Policy Act Guidance

Dear Mr. Boling:

The Family Farm Alliance appreciates the opportunity to comment on the Council on Environmental Quality's (CEQ) Draft Guidance on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act (NEPA) and Draft Guidance for NEPA Mitigation and Monitoring (February 18, 2010).

The Family Farm Alliance is a grassroots organization of family farmers, ranchers, irrigation districts and allied industries in 16 Western states. The Alliance is focused on one mission: To ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers.

Thank you for your proactive efforts to review and find ways of improving the National Environmental Protection Act (NEPA). We have focused our comments on the proposed guidance on the use of categorical exemptions (CEs) and "Findings of no Significant Impact" (FONSI's), which are both important tools in operating and maintaining federal water projects in the West. Based on our review of the guidance, it appears CEQ would like to place more emphasis on monitoring and reporting requirements for NEPA-excluded activities and "front-loaded" environmental mitigation where FONSI's or exclusions have traditionally been used. Western water managers often use these NEPA mechanisms in conjunction with annual operations and maintenance activities on ditches or major rehabilitation and repair projects on existing dams.

As written, these directives would definitely impact Western agricultural water users by adding costs to traditionally less-expensive NEPA activities and analyses. The Alliance believes that without new sources of water, increasing urban and environmental demands in a changing climate will deplete existing agricultural supplies and seriously threaten the future of Western irrigated agriculture. The often slow and cumbersome federal regulatory process is a major obstacle to realization of projects and actions that could enhance Western water supplies. NEPA

implementation, in particular, can have a direct bearing on the success or failure of critical water supply enhancement projects.

Past Alliance Efforts to Engage in Efforts to Modernize NEPA

For the past five years, the Alliance has engaged in several forums with the intent of providing constructive recommendations to streamline federal environmental laws – most of them signed into law over 30 years ago. We have surveyed irrigators and water managers throughout the West and asked them to identify the regulatory impediments they most frequently encounter as they seek to construct projects that enhance water supplies. NEPA “horror” stories were abundant, and some of those impediments related to NEPA implementation will be described later in this letter. In 2005, Alliance representatives participated in hearings conducted by the Congressionally-directed NEPA Task Force. We used that forum to provide recommendations to streamline NEPA regulations as they relate to new water supply and conservation projects.

We worked closely with Congress as the NEPA Task Force was developed, and generally supported its findings and recommendations. In assessing the Task Force report, we compared it to the problems identified by the Alliance’s survey and to recommendations we presented to the Task Force. Of course, our focus was more specifically directed at how the Task Force recommendations would contribute to a more streamlined regulatory process for water supply infrastructure projects.

For example, we learned from our members that federal agencies need to do a better job of defining and characterizing cumulative impacts. As it currently stands, the characterization used by agencies to define cumulative impact is so subjective that some obstructionist activist groups are essentially provided tools to fight proposed projects and force a NEPA process.

Our members encourage eliminating redundant environmental review processes. They believe that actions subject to NEPA should only have to proceed through the environmental review process once. For example, if NEPA is completed on a water resources infrastructure project by one agency (e.g., the Bureau of Reclamation) then a second process should not be imposed by another agency on the same project (e.g., the Corps of Engineers when they consider an individual Clean Water Act Section 404 permit).

One key observation noted by our members in our survey was that the alternatives proposed for assessment by federal NEPA regulators are frequently inappropriate, unrealistic, difficult-to-implement, and often in conflict with state law. The NEPA Task Force offered several recommendations that addressed this concern, including support to create unambiguous criteria for the use of Categorical Exclusions, Environmental Assessments (EA) and Environmental Impact Statements (EIS). It was our hope that these criteria, once clarified, would encourage policymakers to also address the confusion that currently exists relative to what exactly constitutes a “significant” impact. Our members felt that the definition of “significant impact to the human environment” needed to be clarified to minimize confusion and varying

interpretations between various local and regional federal agency staff. We continue to believe that proper implementation of this recommendation has the potential to enhance federal agency NEPA engagement and reduce future litigation costs associated with project detractors.

The federal NEPA examination culminated in 2007, when land management agencies adopted rules that clarified existing NEPA procedures and added new procedures to assure inclusion of modest NEPA-related requirements instituted in the Energy Policy Act of 2005. Now, CEQ is preparing to issue new guidance that would appear to nullify the recent federal efforts to make the NEPA process more efficient, especially for those routine activities or projects that pose minimal threats to the environment. Our members have concerns over the more visible negative ramifications associated with the proposed CE guidance. Implications from the FONSI issue – while more subtle – are also of concern.

Draft Guidance Clarifying Appropriateness of “Findings of No Significant Impact” and Specifying When There is a Need to Monitor Environmental Mitigation Commitments

CEQ proposes to provide guidance for departments and agencies of the Federal government on the mitigation and monitoring of activities undertaken in a NEPA process. Through guidance, CEQ seeks to enable agencies to create successful mitigation planning and implementation procedures with “robust” public involvement and monitoring programs. CEQ proposes three central goals to help improve agency mitigation and monitoring. First, proposed mitigation should be considered throughout the NEPA process. Decisions to employ mitigation measures should be clearly stated and those mitigation measures that are adopted by the agency should be identified as binding commitments to the extent consistent with agency authority, and reflected in the NEPA documentation and any agency decision documents. Second, a monitoring program should be created or strengthened to ensure mitigation measures are implemented and effective. Third, public participation and accountability should be supported through proactive disclosure of, and access to, agency mitigation monitoring reports and documents.

CEQ proposes that mitigation goals should be stated clearly by specifying whether they are intended to reduce the impacts to a particular level, as in a mitigated FONSI, or adopted to achieve an environmentally preferable outcome. The draft guidance states that these should be carefully specified in terms of measurable performance standards to the greatest extent possible.

Concerns Regarding Public Involvement

We believe that CEQ should support the continued use of mitigation to reduce the level of impacts so the “potential” for adverse environmental impact is reduced and no longer considered significant. However, mitigation and other environmental commitments from the NEPA process should be incorporated into the various permit and planning documents that are the responsibility of the governmental agency responsible for issuing the permit or issuing the planning / operation document. It is the responsibility of the agency responsible for implementing NEPA to communicate these commitments to the public.

It should be noted that mitigation and environmental commitments made during the NEPA process are in fact public, as they are incorporated into the environmental review document and the decision document, be that a FONSI or Record of Decision.

This confirms our position: no separate process is needed to inform the public.

Concerns Regarding Monitoring “Overkill”

Our members have noted that agencies will sometimes place proposed mitigation activities in an analysis up front (called “front loading”), thereby qualifying the activity as eligible for a FONSI rather than an EIS. This is because a FONSI is often significantly less expensive and the process far less time consuming. The agencies will add mitigation measures, such as riparian restoration, as part of the proposed project, thus analyzing the impacts to the environment that include such mitigation in the EA, leading to a FONSI.

The new guidance implies that these measures, while legal and probably encouraged, are not reviewed, monitored, reported on, or audited for compliance on a recurring basis to ensure performance and ongoing compliance with NEPA.

We are concerned that the recommendation to add significant monitoring will add layers of process and never ending reporting requirements and audits to the FONSI process. This in turn will add costs to NEPA analyses for the simplest of federal activities (e.g. extraordinary maintenance on existing water infrastructure facilities). Of course, we want to ensure that mitigation measures actually work and are maintained to meet the FONSI requirements. However, the guidance must ensure that these actions do not result in regulatory “overkill” and are conducted in as efficient and cost effective manner as possible.

Clear, unambiguous, and technically sound performance criteria should be used to assess whether mitigation and other environmental commitments are being successfully achieved rather than simply requiring monitoring activities. Environmental systems are inherently variable and monitoring alone is rarely able to show or demonstrate success.

Revised Draft Guidance Clarifying Use of Categorical Exclusions

A “categorical exclusion” describes a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive Environmental Assessments or Environmental Impact Statements. Applying for a new categorical exclusion, for example, can potentially ease the Federal Energy Regulatory Commission permitting requirements for irrigators who want to install small hydroelectric

projects in existing canals and ditches. These projects have minimal environmental impacts and offer over 50,000 opportunities in the U.S. to create new, clean, renewable sources of energy.

Importance of CEs and Questioning the Need to Limit Their Use

CEs are an efficient means of getting “shovel-ready” projects moving and putting people to work in our struggling Western U.S. economy. In its February 2010 report to Congress, CEQ noted that federal departments and agencies noted that, of more than 166,700 NEPA reviews, over 161,000 have been completed, and the rest are underway. NEPA reviews found that roughly 154,000 of the projects or activities came under CEs because they did not have significant individual or cumulative effects on the human environment.

Unfortunately, there are activist groups who use NEPA to delay and/or block efforts of some Western water users to perform the most routine (yet essential) actions. The draft guidance appears to place additional emphasis on public involvement in federal decision-making – which we fear will open up the decisions made in applying even existing CEs to public scrutiny and provide more opportunities for litigation launched by obstructionists.

These same activist groups appear to be leading the charge for a more restrictive NEPA implementation approach. The guidance seems to reflect this position, and assumes that major reforms are needed to correct perceived misapplication of existing CEs. We have a different perspective. While there is room for progress in streamlining CE documentation, the use of CEs is clearly a critically important tool for advancing projects that have no significant impacts. We believe that the newly proposed CEQ NEPA guidance will severely limit the viability of this important tool, since the perception within federal agencies may be that existing CE implementation is flawed, which could contribute to uncertainty and reluctance about the issues of CEs. The result will be increased costs and a greater delay in a project development process that already takes too long.

Other Concerns

We have some key concerns about the justification and potential impacts of several specific provisions in this guidance. The new guidance will add layers of process that will undermine the intent of CEs. CEQ proposed that federal agencies “tailor the type and length of public involvement to the nature of the proposed category of actions, and its perceived environmental impact” when preparing CEs. By definition, a CE describes a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. Therefore, there is no practical need to further delay and add to the cost of the process by creating unnecessary bureaucratic procedures to increase public participation in an environmentally benign project. The guidance also states that as part of its oversight role, CEQ will begin regularly reviewing agencies’ categorical exclusions. This, again, adds another layer of government review and process, far-removed in most cases from where a project is being proposed.

The guidance states that each federal agency “should develop and maintain the capacity to monitor actions approved based on categorical exclusions where necessary to ensure the prediction that there will not be significant impacts is borne out in practice.” We encourage CEQ to revise this sentence to eliminate any implication that federal agencies have a substantive duty to ensure that a particular outcome is achieved after a CE is issued.

We encourage the continued use of CEs to streamline the NEPA process. In general, we urge CEQ to focus on ways to expedite the NEPA process, not add on layers of new requirements. We especially recommend that CEQ encourage the broader application of CEs for projects with no significant effects, rather than restricting their use.

The Health of Rural Communities Depends on Less Regulation, Not More

U.S. Department of Agriculture Secretary Tom Vilsack is proposing a new “Rural Renaissance”, which consists of a “Regional Innovation Initiative” built on five pillars: 1) improved and expanded rural broadband; 2) biofuels and biobased products; 3) linking local production with local consumption of farm products; 4) ecosystem markets to pay farmers for storing carbon; and 5) forest restoration and private land conservation.

The Obama Administration’s attention to the plight of rural America by looking for new ways for farmers to improve their cash flow is an encouraging first step. However, American farmers and ranchers have a proven track record of producing safe, affordable and bountiful food and fiber. Why not also look at those things that can be done to encourage them to do what they are very good at doing, and find ways to bring along a new generation farmers that continue what their forefathers did?

In the rural West, water is critically important to farmers and ranchers and the communities they have built over the past century. However, in recent decades, we have seen once-reliable water supplies for farmers steadily being diverted away to meet new needs. Rural farming and ranching communities are being threatened because of increased demand caused by continued population growth, diminishing snow pack, increasing water consumption to support domestic energy, and emerging environmental demands.

Right now, it seems that water policies are being considered separately from foreign and domestic agricultural goals. Federal agencies in the past year have steadily re-written numerous environmental policies (including NEPA) that - if not checked – could carry the risk of real potential harm for Western agricultural producers. A recent United Nations study finds that global food production must be increased by 70% in the next four decades to meet escalating world hunger demands. American family farmers and ranchers for generations have grown food and fiber for the world, and we will have to muster even more innovation to meet this critical challenge.

That innovation must be encouraged rather than stifled with new regulations and uncertainty.

Conclusion

Thank you for this opportunity to provide input on this matter, which is very important to the family farmers and ranchers of our membership. We are hopeful that a concerted good-faith effort working with CEQ will result in a streamlined regulatory process that will be efficient, fair and effective. We look forward to working with you toward that goal.

If you have any questions about this letter, I encourage you or your staff to contact me at (541)-850-9007.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Keppen', with a stylized flourish at the end.

Dan Keppen
Executive Director